

No. 42154-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Calvert Anderson, Jr.,

Appellant.

Thurston County Superior Court Cause No. 11-1-00101-0

The Honorable Judges Gary Tabor and Thomas McPhee

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Anderson's constitutional right to due process by admitting into evidence a tainted eyewitness identification.
2. The trial court erred by admitting into evidence Wagner's out-of-court identification of Mr. Anderson.
3. The trial court erred by permitting Wagner to make an in-court identification of Mr. Anderson.
4. The trial court erred by entering Conclusion of Law No. 3.
5. The trial court erred by entering Conclusion of Law No. 4.
6. The trial court erred by entering Conclusion of Law No. 5.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Due process prohibits the use of tainted eyewitness identification testimony at a criminal trial. Here, Wagner's identification of Mr. Anderson occurred under circumstances that were impermissibly suggestive. Did the erroneous admission of tainted identification testimony violate Mr. Anderson's Fourteenth Amendment right to due process?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

January 1, 2011 was a cold day in Thurston County. Mackie Perryman was out warming up his car when a man approached and asked him for a ride. RP (5/16/11) 51. Perryman declined. RP (5/16/11) 52.

A neighbor, Nicholas Wagner, was taking down his Christmas lights with his young daughter. He saw the man at Perryman's driveway, and then at his neighbor Regnol Coiteux's driveway. RP (5/16/11) 36-38. Coiteux had started his car so that it could defrost, and had gone inside his house. RP (5/16/11) 32-33. Wagner heard the man shout multiple times that he would steal Coiteux's car. The man then got in and drove it away. RP (5/16/11) 36-41. Wagner did not call the police. RP (5/16/11) 42.

From inside his house, Coiteux saw his car drive away. RP (5/16/11) 32-33. He called the police. RP (5/16/11) 32.

Wagner later told police that the man he saw wore a dark blue or grey hoodie with the hood up. RP (5/16/11) 39, 44-45; RP (5/9/11) 8. He said that the man was medium or average height and weight, with a medium complexion, and that he was in his early to mid-twenties and had a goatee. RP (5/16/11) 45, 47-48. Wagner said that he did not talk with

the man, and that the closest he was to him was 20 to 25 feet away.¹ RP (5/16/11) 46; RP (5/9/11) 7.

Later on, Deputy Tinsley came to talk with Wagner. Tinsley brought up a photo of Calvert Anderson, Jr. on the laptop screen in his patrol car. RP (5/9/11) 4-9. The photo was from law enforcement's system, and included identifying information as well as the word "inmate." RP (5/9/11) 15-17. When Wagner saw the photo, he said "that's the guy." RP (5/9/11) 14.

The state charged Calvert Anderson Jr. with Theft of a Motor Vehicle. CP 2.

The defense moved to suppress Wagner's out-of-court identification of Mr. Anderson, and to prevent him from making an in-court identification. Motion to Suppress, Response in Opposition, Supp. CP. The court held a hearing and denied the motion. RP (5/9/11) 4-30; CP 3-5.

Mr. Anderson was convicted after a jury trial. CP 6. The state introduced into evidence Wagner's out-of-court identification of Mr. Anderson, and had Wagner identify Mr. Anderson at the trial. RP

¹ The officer estimated the distance as 30 feet. RP (5/9/11) 7.

(5/16/11) 43. Perryman also identified Mr. Anderson. RP (5/16/11) 55.

Mr. Anderson timely appealed. CP 16-26.

ARGUMENT

THE TRIAL COURT VIOLATED MR. ANDERSON’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ADMITTING TAINTED IDENTIFICATION TESTIMONY.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether or not an identification procedure is unduly suggestive is a mixed question of law and fact, subject to review *de novo*. *See, e.g., Humphrey Industries, Ltd. v. Clay Street Associates, LLC*, 170 Wash.2d 495, 502, 242 P.3d 846, 242 P.3d 846 (2010); *See also United States v. Gallo-Moreno*, 584 F.3d 751, 757 (7th Cir. 2009).

B. In this case, Wagner’s identification of Mr. Anderson was impermissibly suggestive as a matter of law.

A criminal defendant has a constitutional right to due process of law. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3. Admission into evidence of an eyewitness’s identification violates due process if it is “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Simmons v. United*

States, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968); *State v. McDonald*, 40 Wash. App. 743, 700 P.2d 327 (1985).

Once an identification procedure is shown to be impermissibly suggestive, the evidence is presumed to be inadmissible, and the court is then required to examine the totality of the circumstances to determine whether the procedure created a substantial likelihood of irreparable misidentification. *State v. Vickers*, 148 Wash.2d 91, 118, 59 P.3d 58 (2002). Under this test, the corrupting effect of a suggestive identification is weighed against factors indicating reliability. *Neil v. Biggers*, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972). These factors include (1) the opportunity of the witness to view the perpetrator, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description, (4) the witness' certainty at the time of the identification, and (5) the length of time between the crime and the identification. *Id.*

An out-of court identification that rests on "presentation of a single photograph is, as a matter of law, impermissibly suggestive." *State v. Maupin*, 63 Wash. App. 887, 896, 822 P.2d 355 (1992) (citing, *inter alia*, *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977)). Thus, where an identification is based on a single photograph, the court must analyze the five factors outlined in *Biggers*.

In this case, Wagner's identification was based on a single image of Anderson, rather than a lineup or a photomontage. RP (5/9/11) 9. The image was displayed on a police officer's laptop, and included extraneous prejudicial information (including the word "inmate"). RP (5/9/11) 10, 14-17. The identification was therefore impermissibly suggestive as a matter of law. *Maupin*, at 896.

The trial judge failed to analyze the five factors outlined in *Biggers*.² CP 3-5. Under the totality of the circumstances, the out-of-court identification procedure was so impermissibly suggestive as to create a very substantial likelihood of irreparable misidentification.

First, Wagner was never face-to-face with the person in the blue or gray hoodie; the closest they came to each other was twenty to thirty feet. RP (5/9/11)7.

Second, Wagner acknowledged that he was focused on taking down his holiday lights and monitoring his seven-year-old daughter. He was not particularly focused on the person in the hoodie. RP (5/16/11) 46.

Third, there is no proof that Wagner's vague description matched the suspect's appearance, because the suspect was not apprehended on the

² The trial judge found that the procedure was not impermissibly suggestive, and thus did not examine the *Biggers* factors. CP 3-5. The judge did make a passing reference to the totality of the circumstances, but did not analyze any of the individual factors. CP 3-5.

day of the incident. Nor was his description sufficiently specific to allow the police to positively identify Mr. Anderson. The only factors supporting the prosecution's position were Wagner's apparent certainty and the relatively brief period between the theft and his identification. But these factors alone cannot overcome the presumption of inadmissibility.

Under these facts, Wagner's out-of-court identification was tainted by impermissibly suggestive circumstances. This created a substantial likelihood of irreparable misidentification, and required suppression. *Vickers*, at 118. Furthermore, Wagner's in-court identification of Mr. Anderson should also have been suppressed, because the prosecution failed to establish an independent source for the evidence. *See, e.g., State v. Johnson*, 132 Wash.App. 454, 459, 132 P.3d 767 (2006).

Mr. Anderson's conviction must be reversed, the identification testimony suppressed, and the case remanded for a new trial. *Vickers*, *supra*.

CONCLUSION

For the foregoing reasons, Mr. Anderson's conviction must be reversed. Wagner's identification of him as the thief must be suppressed, and the case remanded for a new trial.

Respectfully submitted on October 20, 2011.

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CERTIFICATE OF SERVICE

I certify that on October 20, 2011:

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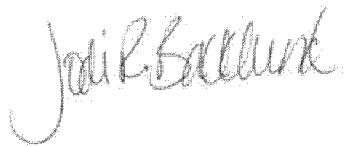
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 20, 2011.



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October 20, 2011 - 11:02 AM

Transmittal Letter

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